IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL GRANT, Individually and on behalf of all others similarly situated, Plaintiff, -vs- COMMONWEALTH EDISON COMPANY, an Illinois corporation, Defendant.	)	Case No. 13 C 8310 Chicago, Illinois June 4, 2014 9:15 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GARY FEINERMAN

APPEARANCES:

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(Proceedings heard in open court:)

THE CLERK: 13 C 8310, Grant versus Commonwealth Edison.

MR. EDELSON: Good morning, your Honor. Jay Edelson for the plaintiff.

MR. OCHOA: Good morning, your Honor. John Ochoa for the plaintiff.

MS. DAVIS: And Leslie Davis on behalf of the defendant.

THE COURT: Good morning. We're here for a status hearing, and we're all scheduled out through February of next year. There's a pending motion to dismiss, and I wanted to give a ruling on the motion. I'll give an oral ruling rather than a written ruling.

The motion's going to be denied. That's not to say that the arguments, either or both of the arguments that Com. Ed. made wouldn't succeed in another setting like a motion for summary judgment or at a trial, but on the pleadings, on a Rule 12(b)(6), the motion just can't be granted.

The Court can consider just the allegations of the complaint and any attachments to the complaint, and all the -- importantly, and this is really the key, all inferences have to be drawn in the plaintiff's favor.

So, on the issue of consent, let's assume that all

the legal issues break Com. Ed.'s way. Com. Ed. can prevail only if Grant provided his wireless number as a point of contact in his business relationship with Com. Ed. And the way the FCC put it is Grant provided his number as one at which he wished to be reached.

That factual premise is not established by the pleadings. We don't know if Grant gave Com. Ed. his cell number and identified it as the number at which he wanted to be reached. In fact, the pleadings don't even establish how Com. Ed. got the number, got Grant's cell phone number or -- and whether Com. Ed. got the cell phone number from Grant.

Now, when we step back into reality land as opposed to 12(b)(6) land, it's probably the case that Grant gave the number to Com. Ed. I'm not quite so sure whether Grant identified that as the number at which he wished to be called. But in order to indulge -- indulge those suspicions, I'd have to draw inferences in favor of the defendant, and I can't do that under 12(b)(6).

So, the factual premise for Com. Ed.'s motion as to the consent issue is absent, even assuming that all the legal issues break in Com. Ed.'s favor, which I'm not sure they do.

In case I forget to mention it later, I'll mention it now. The issue of whether the 1992 order or the 2012 order prevails should be addressed by Com. Ed. in something other than a footnote. It was really the plaintiff's big

argument -- or one of their big arguments; and it's -- the 2012 order did come after the 1992 order, so there will have to be a little bit more discussion from Com. Ed. as to how those two orders fit together and whether the ground changed in terms of what is required in order to be a valid consent in a situation like this.

The second issue has to do with the emergency exception, and the statute creates an exception for a call made for emergency purposes. The regulation says calls made necessary in any situation affecting the health and safety of consumers is excepted from the telephone act. And the regulation -- or the FCC in the order specifies calls alerting utility customers to service outages, to warn customers of discontinuation of service, and to contact the party designated by the customer in the event that a delinquent bill or service outage threatens interruption of that customer's service.

The text message itself, as I think we can all agree, even without drawing inferences in the plaintiff's favor, did not involve an actual emergency situation or an actual service outage. The message was just saying, "In the event that something like this happens, Com. Ed. may send you -- will send you a text," hardly a war crime.

But I can't conclude from the pleadings that -- well, what the defendant -- I think the defendant implicitly

acknowledges that there was no actual emergency, but what the defendant argues is the message saying, "In the event of an actual emergency, we're going to text you," was a necessary and logical first step in the communication chain. Kind of makes sense. I could see Com. Ed. possibly prevailing on that. But again, at the pleading stage, in order to break Com. Ed.'s way on that issue, I'd have to draw inferences in its favor, and I can't do that on a 12(b)(6) motion.

In particular, I don't know whether -- I can't conclude on a 12(b)(6) that it would be a necessary first step in the communication chain. In other words, would consumers be less likely to believe a text that was sent about an actual outage if they didn't first get an introductory text? I don't know. Probably, but probably isn't good enough on a 12(b)(6) motion.

So, again, the factual predicate -- Com. Ed. may end up winning on this issue, too, but the factual predicate is absent in a 12(b)(6) setting.

So, for those reasons, I'm going to deny the motion to dismiss. Com. Ed. should answer the complaint by June 25th.

And, you know, there's a dispositive motion deadline of February 20th, 2015. There's no rule saying that you have to wait until the deadline to file a summary judgment motion. The rule says you can file one at any time. So, if you think

you have a kill shot, take it, and we'll see -- we'll see what happens.

I don't know how it's all -- I don't know what the facts are. I haven't examined the legal issues in detail so I can't even say that the legal issues are going to break Com. Ed.'s way. I don't know. I just didn't have to get there because the factual predicate wasn't there even if the legal issues did break Com. Ed.'s way.

So, that's all I have to say on the motion to dismiss. Have the parties been engaged at all in fact discovery?

MR. EDELSON: Yes, your Honor. We've exchanged and responded to written discovery. We just got Com. Ed.'s responses earlier this week and are going through it, and then we'll be serving deposition notices within the next week.

MS. DAVIS: That's right. We just exchanged -- mutually exchanged earlier this week, and so that's the next step.

THE COURT: Okay. And what kind of depositions -- or how many depositions, who are you planning on deposing? Do you know that at this point?

MR. OCHOA: Sure. At least two depositions, your Honor, one of a representative of Com. Ed., probably one of a represent of their marketing agent, 5/11, who actually sent the text messages.

THE COURT: And do you plan on deposing the plaintiff?

MS. DAVIS: Yes, definitely, we will be deposing the plaintiff for sure; and beyond the plaintiff, we're not sure yet exactly who else we may be seeking to depose.

THE COURT: Okay. Do the documents provide any indication as to how Com. Ed. came into possession of Mr. Grant's cell phone number?

MS. DAVIS: Yes, your Honor. We have responded to that in the discovery. We've given them a few documents that show exactly when we got his number; and once they start taking depositions, they can get further explanation of what those documents actually say, and they will come to find out that he actually gave his number when he established service.

So, that's all information that I expect them to get readily when we get further in discovery and when they start taking depositions and looking through the documents, because it's there as well.

THE COURT: Okay. All right. Do you have any thoughts on that from the plaintiff's side?

MR. EDELSON: We have a different story at this point, but we want to study what they've given us and, you know, whatever it says, we're going to take obviously very seriously.

THE COURT: Okay. Very good. Does either side

anticipate disclosing experts?

MS. DAVIS: At the point that we get past discovery and are looking more towards trial in this matter, we will be looking at experts for sure, I'm sure.

THE COURT: Because the -- the reason I ask is that the expert disclosure schedule starts on August 8th, I think, so --

MS. DAVIS: Your Honor, if we could get past the -- the depositions, I think we'll be in a better position to know exactly where we're at, because at that point, all of the information will be available to both plaintiff and for us to use in whatever way we need to for dispositive motions.

And so if your Honor will entertain if we need to come back because we're not on schedule to be able to disclose experts by August, we come back before the Court and ask for additional time at that point.

MR. OCHOA: As for the plaintiff, the only expert we believe we may use is one to establish that an automatic telephone dialing system was used in this case, although given the volume of the text messages sent, we think it's pretty clear it already meets the statutory definition.

THE COURT: All right. Why don't we come in, assuming both sides are going to be in town, the week of July 28th.

THE CLERK: How about we set you for July 29th,

9:00 a.m.

THE COURT: Is that good for both sides?

MR. EDELSON: Yes, your Honor, for us.

MR. OCHOA: That should be good, yes.

MS. DAVIS: That works.

THE COURT: Okay. Very good. I'll see you then. I'll ask further about experts -- I'll ask for confirmation on the parties' plans regarding experts, and I'll also ask if the parties are interested in a settlement conference at that point. All right?

MR. EDELSON: Thank you very much, your Honor.

MS. DAVIS: Thank you, your Honor.

MR. OCHOA: Thank you, your Honor.

(Which were all the proceedings heard.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Charles R. Zandi *June 5, 2014*

Charles R. Zandi
Official Court Reporter

Date